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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 90

PEOPLE OF THE STATE OF ILLINOIS EX REL. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, AND ELMER C. BASH AND ALICE J. BASH, AND WANDA I. BASH, A MINOR, BY ELMER C. BASH, HER FATHER AND NEXT FRIEND,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

APPELLANT'S REPLY BRIEF.

WALTER F. DODD,
30 North La Salle Street,
Chicago, Illinois,
Attorney for Appellant.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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APPELLANT'S REPLY BRIEF.

JURISDICTION.

It is difficult to understand Appellees' position that jurisdiction does not exist because the assignment of errors in this Court (Tr. 281) is not in the same language as the errors relied upon in the Supreme Court of Illinois (Appellees' Brief, 2). In the state court two of the errors (2 and 3) assigned related to the state constitution and state statutes, and were finally determined by that Court. Upon the errors relied upon and discussed in printed brief and oral argument before the Supreme Court of Illinois,

the first alleged invalidity of the whole plan at issue as in violation of the Fourteenth Amendment; the 4th alleged further violation of the Fourteenth Amendment. The federal issues so presented are rephrased in the assignments of errors in this Court, with the omission of issues finally decided in the state court.

By quoting a separate sentence of Appellant's Brief opposing Motion to Dismiss Appeal (p. 3), Appellees seek to lay the basis for a false statement to the effect that Appellant admitted that her claim as to the use of school property and school funds was based solely on state constitutional and statutory grounds (Appellees' Brief, 147). A directly contrary statement is found on page 4 of Appellant's Brief opposing Motion to Dismiss Appeal. The errors relied upon for reversal in the Supreme Court of Illinois are printed on page 2 of Appellees' Brief. Errors (2) and (3) were based solely on the Illinois constitution and statute, and Error (1) related to and was the basis for discussion of the general problem as to the use of public schools for religious instruction. The matter is further discussed in the Brief for Appellant, pp. 2-5. That this is a taxpayer's action is admitted by Appellees (Appellees' Brief, 6). By error (1) in the Supreme Court of Illinois, Appellant as a taxpayer objects to uses of the public schools for religious education as violative of the Fourteenth Amendment, such uses necessarily involving the employment of public employees and the use of public property. Error (4), relating to the discretion of the school board violative of the Fourteenth Amendment, was said by the Supreme Court of Illinois not to have presented itself in the trial, although the record shows the contrary, but, it is obvious that, having taken this position, that court based its comments on federal issues upon Error (1). The issue of violation of the Fourteenth Amendment

through the plan in dispute meets the standard set by this Court in *Wilson* v. *Cook*, 327 U. S. 474.

Appellees, although they claim that the matter is not at issue in this case, devote a large portion of their argument to the claim that public money may be used for their purpose.

Appellees seek to establish that the Appellant has no right to complain of the infringement of the religious freedom of her son (Appellees' Brief, 6, 7, 117), nor to seek to establish unfairness as between religious groups (Appellees' Brief, 8, 9, 117). Their position may be summarized as a contention that Appellant can bring suit, but cannot challenge the plan at issue. It is unnecessary to discuss the cases which Appellees cite, for they do not support Appellees' position. Admittedly Appellant has an interest in and a right to bring this suit. This gives a right to raise the issues presented by the plan in controversy. *Tileston* v. *Ullman*, 318 U. S. 44 (1943), presented an entirely different situation in that the party bringing suit had no standing or interest therein.

The most important, and obviously the most erroneous, position of Appellees, is that the Appellant did not contend in the state court that there was a violation of the First Amendment (Appellees' Brief, 4, 5, 11). Page 19 of Appellees' brief indicates why the brief is largely devoted to the First Amendment. Appellant could not charge a state or local violation of a constitutional provision applicable only to Congress, although the Fourteenth Amendment is now "interpreted to make the prohibitions of the First applicable to state action abridging religious freedom." *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1947).

THE FACTS.

Appellant adheres to every statement of fact in her brief. Each statement is accompanied by a reference to the transcript; is based thereon; and does not attempt to be a favorable construction of the facts of this case. It may, however, now be desirable to make several repetitions with special regard to the weight which appellees say (Appellees' Brief, 12) should be given to the facts found by the trial court and the Supreme Court of Illinois.

The Supreme Court of Illinois says that the religious classes are "conducted on a purely voluntary basis" (396 Ill. 29). The grade pupils were solicited on a "Please permit" card which the public schools distributed and collected through their teachers (Trans. 176, 94, 133, 147, 253). The appellant was advised by his public school teacher to have her son take the religious education course (Trans. 69, 135, 182).

Of 35 religious education classes in the public schools of Champaign, 32 were Protestant, and the more general practice with the Protestant groups is that they remain in their classroom, and that the public school teacher remain during the religious class (Trans. 91, 133, 137). This sponsoring by public school teachers would be denied by Appellees (Brief, 155). The three Catholic classes each went to another room—one to a basement room; one to a small music room; and one to a class room (Trans. 150-151). Appellees' argument would deny any advantage in having the usual class room, with the school teacher present (Appellees' Brief, 87).

Rev. Alva R. Cartlidge, Chairman of the personnel com-

mittee of the Champaign Council of Religious Education, testified that:

> "I would welcome the Lutherans but the council reserves the right in its cooperative movement with the Lutherans represented upon it that no prejudicial personalities or materials be put in the courses" (Trans. 162).

Appellees argue that there is no censorship or discrimination as to religious groups (Appellees' Brief, 161-162). This Court is asked to consider the above quotation, and, the quotations on pages 8 to 11 of Appellant's original brief, and also to consider the effect upon secular instruction if every independent religious group is given separate facilities and time within the school building and within school time. Of course public school teachers would not be available for each religious class. Any one acquainted with the public school system of this country must know of the confidence which pupils develop in a competent teacher, and of the influence which must be employed by such teacher. With such a teacher made an agent and sponsor in religious teaching, no human can avoid the development of religious influence. Dominant control by the dominant religions of the area cannot be avoided if teaching by religious groups is permitted as a part of the public school program.

The trial court found that:

> "The Jewish classes of course would deny the divinity of Jesus Christ. The teaching in the Catholic classes of course explains to Catholic pupils the teaching of the Catholic religion, and are not shared by other students who are Protestants or Jews. The teachings in the Protestant classes would undoubtedly from the evidence, teach some doctrines that would not be accepted by the other two religions" (Trans. 66).

Appellant's son, when the only person in his class not taking religious teaching, was, for some time left alone during the religious period, once in the hall and later in the music room (Trans. 177-178, 255). On testimony of students as witnesses, most of whom attended the larger Protestant Churches (Appellant's Brief, 28-29), the trial court apparently takes the view that there was no occasion for embarrassment

> "except in so far as there is any natural embarrassment to a child in being the only one in his room who did not take the religious education courses and who went out of the room to study by himself because of that fact" (Trans. 69).

This is the very embarrassment which caused the highest courts of Illinois, Iowa, Louisiana, Missouri and Wisconsin to hold religious services in public schools to be invalid, even though attendance was voluntary. The substantial difference between these cases and that here at issue is that the plan here involved advertises religious group memberships and failures to take religious courses. *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334 (1910); *Knowlton* v. *Baumhover*, 182 Ia. 691, 166 N. W. 202, 5 A. L. R. 841 (1918); *Herold* v. *Parish Board*, 136 La. 1034, 68 So. 116; *Harfst* v. *Hoegen*, 349 Mo. 808, 163 S. W. 2d 609, 141 A. L. R. 1136 (1941); *State ex rel. Weiss* v. *District Board*, 76 Wis. 177, 44 N. W. 967. The *Ring* case will remain the law of Illinois if the opinion of its Supreme Court in the present case is not sustained.

The trial court found that:

> "to some slight extent the defendant has indirectly appropriated public funds for the use of these classes, by the furnishing of rooms in public school buildings, light, heat, janitor service, and so forth * * *" (Trans. 70).

The services of school teachers and school officers is perhaps the most important expense. Appellees say that "two courts below, without dissent, determined that as a matter of fact the religious education classes did not increase the appellant's tax burden" (Appellees' Brief, 153). This should be compared with the trial court's statement which is quoted above.

Appellees object to appellant's remarks about conditions likely to present themselves under the plan here in controversy, and to her reference to an official document on "Race Relations in Chicago." They also object to suggestions by Appellant that this Court need not limit to Champaign, Illinois, its consideration of the conditions likely to develop under the plan (Appellees' Brief, 128, 137, 138). Appellant submits these matters to the Court without further comment. The issue here presented involves the nation. Appellees themselves say that the present case involves a great experiment on a nation-wide scale.

The Appellees also say that the law cannot protect atheists (Appellees' Brief 134); and that Jews and Catholics would be as much embarrassed at a school cafeteria as by being withdrawn from their school room because of religious lessons in the school—the Jews having no religious class to attend (Appellee's Brief, 136). This is for the Court to consider.

The First Amendment and Appellees' Argument That States May Establish Religion.

Appellees base a large part of their Brief (pp. 24-100) upon the view that the only provision of the Federal constitution applicable to the present case is that of the First Amendment which provides that:

> "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof * * *"

The argument, based upon the words "establishment of religion," is that these words, when applied to the states, mean merely that the states shall not discriminate among religions; but, that if it is to be construed otherwise, the phrase refers only to a nation-wide religion, and is not binding on the several states. This position is, of course, directly inconsistent.

Appellees summarize one of their positions by saying that:

> "We have pointed out in our argument on the meaning of the 'establishment of religion' clause of the First Amendment that no law, whether it imposes the tax or not, is invalid under such amendment unless in addition to or as a part of the imposition of the tax, it prefers one religion over another" (Appellees' Brief, 159).

To construe this language as applicable to states but not interfering with the equal state establishment of all religions, is perhaps not as consistent as it would be to construe the language as applying only to a nation-wide religion, and leaving the states free to set up such a religion as they should consider proper. Experience in all countries and in Champaign, Illinois, shows the incapacity to treat all religious groups equally, and the dominance of the larger groups. The plan defeated by James Madison, and found in an appendix to *Everson* v. *Board of Education*, 330 U. S. 72, may at the time have been regarded as conforming to Appellees' contention of equality.

It is clear that the First Amendment did not apply to the states, and that, after its adoption, state religious organizations continued in the states. This situation is well discussed in Greene, The Development of Religious Liberty in Connecticut (1905). Since the adoption of the Fourteenth Amendment and its extension to apply to free-

dom of religion, this Court has, more recently, held that the religious freedoms guaranteed by the 1st Amendment are also included in those guaranteed by the 14th Amendment.

The present case is not based on the 1st Amendment, but on the 14th Amendment, which incorporates, as to the states, the freedom of religion guaranteed by the First. It is not necessary, under the decisions of this Court, to find in the First Amendment all religious freedoms guaranteed by the Fourteenth.

But, in the present case, it is obvious that the prohibitions of the 1st Amendment fall within the 14th Amendment, and that the facts of the case bring it within the "establishment of religion" clause as defined in *Everson* v. *Board of Education*, 330 U. S. 1 (1946), pages 15-16. Appellees seek to narrow the use of the word "tax" as used in that definition (Appellees' Brief, 159), but there is no doubt of the Court's language applying to continued use of public facilities, even though there has been no computation of public cost or levy of a specific tax for the purpose.

The Appellees seek, in order to establish their objective, to make sure that a state be subject "only to the requirement that it treat all faiths, religions, sects and beliefs equally and without discrimination" (Appellees' Brief, 107); and they seek to have the "establishment of religion" clause of the First Amendment refer to a nation-wide religion, and not to be binding on the states (Appellees' Brief, 101, 115). They would permit official religious organizations by the states, and leave unaffected the prohibition of an "establishment of religion" by the United States. But, apparently, they would leave to this Court a determination whether public schools might assign too

long a period for religious education (Appellees' Brief, 160).

The Wall of Separation Between Church and State.

The church properly has, and must continue to have, an important share in the life of our people. But, if it takes over the public school system as the organ of religious education, it will, unless human characteristics fundamentally change, place the larger denomination or group in control within its area. It is not sufficient to say that schools are too far from the churches for students to go to them for education after being released from school, or that churches are too far from residential areas to provide week-end training. The Lutherans were able to provide religious teaching on Saturday morning (Trans. 122).

The church is an important organization, with functions largely of a charitable type, and subject generally to the same tax-exemptions as are charities and private schools. It may educate its own youth, subject to maintaining a standard comparable with that of the public schools. Appellant's original brief seeks to outline in a few pages certain of the relations between public schols and sectarian instruction (Appellant's Brief, 15-20). It may be well to indicate some of the established relations between church and state.

(1) *Business transactions may be made between church and State. Bradfield* v. *Roberts*, 175 U. S. 291 (1899), related to a contract for the treatment of poor patients by a hospital managed by Catholics, but with nothing sectarian in the corporation. Appellees seek to find something in this case which may define the phrase "respecting an establishment of religion" in the First Amendment

(Appellees' Brief, 77-78), but there was merely a contract with a non-sectarian corporation. *Quick Bear* v. *Leupp*, 210 U. S. 50 (1908), is referred to by Appellees as sustaining payment to a Catholic organization of public funds for the education of Sioux Indians (Appellees' Brief, 80-82). The quotation from the opinion, made by Appellees (Brief, 82), shows a purely business transaction with funds belonging to the Indians, and the Court finding that:

> "we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof."

Contractual relations with churches, Catholic or otherwise, for services or property, are also recognized by the State of Illinois, as will be illustrated by the case of *St. Hedwig's Industrial School for Girls* v. *County of Cook*, 289 Ill. 432 (1919).

But business relations between churches and state lend no support to Appellees' contention in support of sectarian education in public schools.

(2) *Use of school building as a civic center, available for both religious and other groups, at other than school hours or at times when students are not using the property involved.* This matter was referred to in Appellant's Brief, page 15. Again, it lends no aid to Appellees' plan of sectarian education of school pupils in school buildings and during school hours.

(3) *Parochial and private schools.* Books—transportation—lunches. For many years attendance on parochial or private schools of equal standard has been permitted in

substitution for attendance of the public school; and since *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), parents are authorized to send their children to such schools. Such attendance is a financial burden upon the parents, and a distinct financial advantage to the local taxing body. Moreover, attendance of such a school does not relieve the government of its duty to the pupil. Such a duty has been met by furnishing and requiring the use of certain text books—the same text books thus being selected, for both public and parochial schools and being furnished free of charge.

More recently this Court has sustained an equality of treatment of students of the two types of schools, with respect to transportation. *Everson* v. *Board of Education,* 330 U. S. 1 (1947); and Congress has, by the National School Lunch Act (Chapter 281—Public Law 396; Approved June 4, 1946), adopted a plan of aiding pupils' lunches in both public and nonprofit private schools.

These public aids may be regarded not as aids to sectarian education, but as constituting an equality of treatment as to these matters, in partial payment for an obligation which must be met only in part. The parents are paying for the education, which is in part sectarian; and the governing body is paying several small amounts as elements in encouraging an education for which it is responsible except as to sectarian training.

The opinion in the *Everson* case makes it clear that it lends no aid to Appellees' plan of sectarian education of public school pupils in school buildings and during school hours.

(4) *Released time for religious education.* Appellees claim that their plan for religious education in the school, during school hours, ordinarily in the presence of the public school teacher, and with a segregation of religious

groups in the school, is supported by a plan of releasing students for a short time each week to attend a class of religious education, independent of the public school and not upon the school property. Appellees' Brief, pages 133, 155-157, devotes some attention to the released time plan, which is discussed at pages 16-17 of Appellant's brief. New York may be regarded as the leader of the plan of released time, and explicitly limits it to "outside of the school buildings and grounds." The Illinois Supreme Court has sustained a similar plan.

The released time plan is directly opposed to the plan at issue in the present case, and Appellees could get little encouragement even from *Gordon* v. *Board of Education of City of Los Angeles*, 178 Pac. 2d 488 (1947), which indicates initiative on the part of the Board of Education, encouraged by a liberal act of the California legislature in 1943 (Cal. Education Code, section 8286).

It is clear here, also, that the released time plan lends no support to Appellees' plan of sectarian education of public school pupils in public school buildings and during school hours.

Conclusion.

The issue of this case is one of freedom of religion restricted by sectarian teaching in the public schools, with such sectarian teaching as a part of the public school system, during school hours, in school rooms; with school teachers usually remaining as sponsors, though not as participants, when all students of the class register for religious teaching. The public school is the essential element for the religious teaching. This situation presents itself for the first time.

In order to accomplish their purpose, Appellees claim that states may establish religion, subject "only to the requirement that it treats all faiths, religions, sects and beliefs equally and without discrimination." It would rest upon the state or its local bodies to determine their religions and their equality of treatment, and a preliminary test presents itself in the present case, where it appears that perhaps 90 per cent of pupils and school teachers belong to certain Protestant groups.

If this Court sustains the plan now before it, it will make the public school system the organ of religious education, and will restore the religious situation of the colonies before the American Revolution.

Respectfully submitted,

WALTER F. DODD,
Attorney for Appellant.